In The

Supreme Court of the United States

October Term, 1976

No. 76-1192

HAROLD BROWN, SECRETARY OF DEFENSE, ET AL.,
Petitioners,

vs.

WESTINGHOUSE ELECTRIC CORPORATION, ET AL.
Respondents.

OPPOSITION OF RESPONDENTS WESTINGHOUSE ELECTRIC CORPORATION AND GENERAL MOTORS CORPORATION TO THE MOTION OF THE *AMICUS* ROBERTSON

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QUESTION PRESENTED

Whether an alleged Rule 19 party who received notice of a Reverse Freedom of Information Act action well prior to the trial, and who could have asserted his right to intervene without hardship, can raise a Rule 19 question for the first time in the United States Supreme Court.

STATEMENT

On April 10, 1974, respondent General Motors instituted its action in the United States District Court for the Eastern District of Virginia seeking injunctive relief barring petitioners from disclosing documents provided to petitioners by

respondents as government contractors. By letter dated April 19, 1974, the *amicus* was notified of the pendency of respondent General Motors' lawsuit and the existence of a restraining order against petitioner. Some 18 days later, a trial on the merits was conducted between respondent General Motors and petitioner. Even though he received notice *amicus* did not seek to intervene in respondent's Virginia action but rather on April 26, 1974, chose to file a separate FOIA case in the District of Columbia seeking to compel the disclosure of the self-same documents which were barred from disclosure by the restraining order in Virginia. The Virginia trial court's opinion in the *General Motors'* action was filed on September 20, 1974, and the circuit court's opinion was rendered on September 30, 1976.

At no time, either before the trial court or before the circuit court, did the *amicus* raise his Rule 19 indispensable party allegation. The *amicus* now, for the first time, asserts his Rule 19 contention before this Court.

ARGUMENT

Respondents Westinghouse Electric Corporation[1] and General Motors Corporation oppose *amicus* Robertson's motion seeking to raise the applicability of Rule 19 of the Federal Rules of Civil Procedure to reverse FOIA cases. In its supporting brief, what the *amicus* asks the Court to do is to require the parties to brief the applicability of Rule 19 to reverse FOIA cases.[2]

Respondents' first opposition to *amicus'* efforts to raise his

1. *Amicus* does not seek to raise its Rule 19 contention with respect to respondent Westinghouse since the requestor of the documents in issue intervened at the trial of that case. Respondent Westinghouse nonetheless joins respondent General Motors in opposition to the *amicus*. Respondent Westinghouse asserts the contention of the *amicus* regarding Rule 19 is untenable and wants its opposition to *amicus'* Rule 19 theory to be a matter of record.

2. *Amicus'* brief, p. 12.

Rule 19 contention is based on the lack of ripeness of that issue for review and the inadequacy of the current record to permit review of that issue. *Amicus'* Rule 19 contention was not raised below nor has it even been the subject of a motion to dismiss. Hence, respondent urges the Rule 19 question is not "definite and concrete and touching the legal relations of the parties having adverse legal interests."[3] Nor is *amicus'* Rule 19 allegation in such a posture that any adjudication of it can rest "on an adequate and full bodied record" as this Court requires.[4]

In his motion and brief in support, the *amicus* asserts without qualification that he is an indispensable party within the meaning of Rule 19. Respondents do not concede that the *amicus* possesses "substantive rights" to qualify him as a bona fide Rule 19 party.[5] Contrary to *amicus'* argument of indispensability, respondents urge that *amicus* enjoys no greater status than any other citizen who, under the FOIA, has the right to request records of his Government.[6] The only distinction betwen *amicus* and the other millions of United States citizens is that *amicus* has exercised the right to request documents.

Whatever arguable status *amicus* might have enjoyed either under Rule 19 or Rule 20, persuasive supportive authority exists that by virtue of *amicus'* failure to intervene, he relinquished any right to claim prejudice because of his nonjoinder. In *Provident Bank & Trust Co. v. Patterson,*[7] this Court addressed the issue of nonintervention by an indispensable party, but did not pass on that issue. However, the Second Circuit has considered the

3. *Aetna Life Ins. Co. v. Haworth,* 300 U.S. 227 (1937).

4. *Public Affairs Associates, Inc. v. Rickover,* 369 U.S. 111 (1962).

5. *Provident Bank & Trust v. Patterson,* 390 U.S. 102 (1968).

6. 5 U.S.C. §552 (Supp. V 1975).

7. 390 U.S. 102 (1968).

issue and held that the Government, which was not joined pursuant to Rule 19, could not claim bias because intervention was available to protect its interests.[8] Likewise, another court has stressed that an absentee can often avoid prejudice by intervention and should do so if undue hardship is not imposed by intervention.[9]

Amicus expressly acknowledges that he was notified of the pendency of the present action shortly after the restraining order was entered and well before a trial on the merits was conducted. *Amicus* was located only a few miles across the Potomac River from the court where intervention could have been sought. *Amicus* makes no claim of undue hardship impairing his ability to intervene. *Amicus'* only explanation for not intervening was his dislike for the forum where respondents' litigation was pending and his desire to have his own forum.[10] Respondents assert that under those circumstances, *amicus* should not be heard to complain about the failure to join him as a party at this late date.

Finally, respondents urge that *amicus'* efforts to raise his Rule 19 contention "comes late in the day" in the case. Courts have expressed disfavor toward procedural motions raised at the appellate level. In *Provident,* this Court observed that raising an indispensable party question at the appellate level creates complex problems.[11] In a case decided under former Rule 19, the court held that dismissal was not automatic even though an indispensable party had not been joined. A party who is dilatory in raising a motion may relinquish the right to do so,

8. *Staten Island Rapid Transit Ry. Co. v. S.T.G. Construction Co.,* 421 F.2d 53, 58 n.6 (2d Cir.), *cert. den.,* 398 U.S. 951 (1970).

9. *Smith v. American Fed. of Musicians,* 47 F.R.D. 152 (S.D.N.Y. 1969).

10. *Amicus'* brief, p. 12, n. 5.

11. 390 U.S. at 110.

particularly in light of the direction of Rule 1 of the Federal Rules of Civil Procedure which provides that the rules "shall be construed to secure the just, speedy, and inexpensive determination of every action."[12]

CONCLUSION

WHEREFORE, consistent with the foregoing, respondents urge that *amicus'* motion asking the Court to require the parties to brief the applicability of Rule 19 be denied.

Respectfully submitted,

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12. *Benger Laboratories, Ltd. v. R.K. Laros Co.,* 24 F.R.D. 450 (E.D. Pa. 1959).